



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 17, 2004

Mr. John Feldt
Assistant District Attorney
Denton County Criminal District Attorney's Office
P.O. Box 2850
Denton, Texas 76202

OR2004-9777

Dear Mr. Feldt:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 213223.

The Denton County Criminal District Attorney's Office (the "district attorney") received a request for a specific offense report as well as all other information related to a named individual. You claim that the requested information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.111, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted information contains a complaint, arrest warrants, and affidavits of probable cause. Article 15.26 of the Code of Criminal Procedure states "[t]he arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information." Crim. Proc. Code art. 15.26. Article 15.04 of the Code of Criminal Procedure provides that "[t]he affidavit made before the magistrate or district or county attorney is called a 'complaint' if it charges the commission of an offense." Crim. Proc. Code art. 15.04. Case law indicates that a complaint can support the issuance of an arrest warrant. *See Janecka v. State*, 739 S.W.2d 813, 822-23 (Tex. Crim. App. 1987); *Villegas v. State*, 791 S.W.2d 226, 235 (Tex. App.—Corpus Christi 1990, pet. ref'd); *Borsari v. State*, 919 S.W.2d 913, 918 (Tex. App.—Houston [14 Dist.] 1996, pet. ref'd) (discussing well-established principle that complaint in support of arrest warrant need not contain same particularity required of indictment). The exceptions found in the Act generally do not apply to information that is made public by other statutes. *See Open Records Division No. 525* (1989) (statutory predecessor). The submitted arrest warrants are deemed public. To the extent that the submitted complaint and affidavits of probable cause were presented to the magistrate in support of issuance of an arrest warrant, the district attorney must release

them pursuant to article 15.26. To the extent that they were not so presented, they are not made public by article 15.26 and must be disposed of along with the remaining information at issue.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). The present request, in part, asks for all information held by the district attorney concerning a named individual. We find that this request for unspecified law enforcement records requires the district attorney to compile the criminal history of the individual and thus implicates the individual's right to privacy as contemplated in *Reporters Committee*. Accordingly, to the extent the district attorney maintains any unspecified law enforcement information depicting the individual as a suspect, arrestee, or criminal defendant, any such information is excepted from disclosure under section 552.101 in conjunction with common law privacy. However, the requestor also asks for information pertaining to a specific arrest. Because the requestor specifically asks for this information, it is not part of a compilation of the individual's criminal history as contemplated in *Reporters Committee* and may not be withheld on that basis.

The specifically requested offense report consists of a completed criminal investigation. Under section 552.022(a)(1) of the Government Code, a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it is either excepted under section 552.108 of the Government Code or expressly confidential under other law. You assert that this information may be withheld under sections 552.107 and 552.111 of the Government Code. These sections are discretionary exceptions that protect a governmental body's interests and may be waived. As such, they are not other law that makes information confidential for the purposes of section 552.022. *See* Open Records Decision Nos. 677 at 8 (2002) (attorney work-product privilege under section 552.111 is not other law for purposes of section 552.022), 676 at 10-11 (2002) (attorney-client privilege under section 552.107 may be waived); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Therefore, this information may not be withheld on the basis of section 552.107 or 552.111. However, the attorney-client privilege is also found in Texas Rule of Evidence 503, and the attorney work product privilege is found in Texas Rule of Civil Procedure 192.5. The Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *see also* Open Records Decision Nos. 677 (2002), 676 (2002). You also assert that the submitted

information is excepted under sections 552.108 and 552.130 of the Government Code. Accordingly, we will address your assertions under these privileges and sections 552.108 and 552.130.

You assert the remaining information in Exhibits E and E-1 is excepted under section 552.108 of the Government Code. Section 552.108 provides the following:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4). In *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994), the Texas Supreme Court held that a request for a district attorney's entire file is necessarily a request for work product because "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry*, 873 S.W.2d at 380; *Nat'l Un. Fire Ins. Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993, orig. proceeding).

After reviewing your arguments, we conclude that you have shown that the information in Exhibits E and E-1 was created by an attorney representing the state in anticipation of criminal litigation. Because the requestor in this instance seeks all the information in the district attorney's case file, we agree that complying with such a request would reveal the attorney's thought processes in litigating this case. Accordingly, we agree that section 552.108(a)(4)(B) applies.

However, section 552.108 does not except basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, with the exception of the basic front page offense and arrest

information, you may withhold the information in Exhibits E and E-1 from disclosure based on section 552.108(a)(4).¹

Although basic information is not excepted under section 552.108 of the Government Code, we will consider whether Rule 503 of the Texas Rules of Evidence or Rule 192.5 of the Texas Rules of Civil Procedure protects any of this information. Texas Rule of Evidence 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1); *see id.* 503(a)(2), (a)(4) (defining "representative of the client," "representative of the lawyer"). A communication is confidential if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. TEX. R. EVID. 503(a)(5). Thus, to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication, (2) identify the parties involved in the communication, and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Open Records Decision No. 676 (2002).

¹Because we are able to resolve this under section 552.108, we do not address your arguments for exception of this information, except to note that basic information described in *Houston Chronicle* does not include information covered by section 552.130.

On a demonstration of all three factors, the information is privileged and confidential under Rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). Based on your arguments and our review of the information, we find that you have not established that any of the basic information at issue consists of or reflects privileged communications; therefore, this information is not excepted from release pursuant to the attorney-client privilege.

We turn now to Rule 192.5 of the Texas Rules of Civil Procedure. The Texas Rules of Civil Procedure only apply to “actions of a civil nature.” Tex. R. Civ. P. 2; *In re Georgetown*, 53 S.W.3d 328 (Tex. 2001) (Texas Rules of Civil Procedure and Rules of Evidence are other law for purposes of section 552.022). Accordingly, the attorney work product privilege found in Rule 192.5 does not apply to the criminal information at issue here. Therefore, you may not withhold any of the basic information under the attorney work product privilege.

To conclude, under article 15.26 of the Code of Criminal Procedure, the submitted arrest warrants are deemed public, as are the submitted complaint and affidavits of probable cause if they were presented to the magistrate in support of issuance of an arrest warrant. Under section 552.101 of the Government Code in conjunction with common law privacy, you must withhold any information depicting the individual as a suspect, arrestee, or criminal defendant, except for the specified arrest information. Other than basic information, you may withhold the information in Exhibits E and E-1 under section 552.108 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the

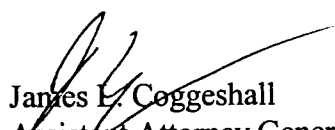
governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,


James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/seg

Ref: ID# 213223

Enc. Submitted documents

c: Mr. Victor Johnson
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(w/o enclosures)